

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Wallace Fatland,

Complainant,

vs.

Brian Smith and Gary Larsen,

Respondents.

**FINDINGS OF FACT,
CONCLUSIONS
AND ORDER**

The above-entitled matter came on for an evidentiary hearing on May 27, 2010, before a panel of three Administrative Law Judges: Eric L. Lipman (Presiding Judge), Steve M. Mihalchick and William R. Johnson. The hearing record closed at the conclusion of the hearing on May 27, 2010.

Wallace Fatland (Complainant) appeared on his own behalf without counsel. He was assisted by Linda Olson and David Green.

Frederic W. Knaak, Attorney at Law, appeared on behalf of Brian Smith and Gary Larsen (Respondents).

STATEMENT OF ISSUE

Did Respondents violate Minn. Stat. § 211B.06 by intentionally participating in the preparation or dissemination of false campaign material that Respondents knew was false or communicated to others with reckless disregard as to whether it was false?

The panel concludes that the Complainant, Mr. Fatland, has not established by clear and convincing evidence that Messrs. Smith and Larsen violated Minn. Stat. § 211B.06.

Based upon the entire record, the panel makes the following:

FINDINGS OF FACT

1. Wallace Fatland, Brian Smith, and Gary Larsen are all residents of Burlington Township, Minnesota (Township).¹

2. Mr. Fatland is an employee of the Township and active in the civic life of the town.²

¹ Testimony of Wallace Fatland, Brian Smith, and Gary Larsen.

3. Mr. Smith and Mr. Larsen are local developers and have each served on the Burlington Township Board. Currently, Mr. Smith is an incumbent Township Supervisor.³

4. In early 2008, the members of the Township Board were Kathleen Froelich, Supervisor and Chair; David Green, Supervisor; Everett Hoskins, Supervisor; Linda Olson, Treasurer; and Angela Ewanika, Clerk.⁴

5. At the March 2008 annual meeting of Township electors, the Board reviewed the proposed 5-year Road Maintenance Plan. The plan consisted of work on the following roads in the following budgeted amounts: Acorn Lake Road, \$50,000; Eagle Lake Road, \$200,000; McHugh East, \$30,000; Hidden Hills, \$30,000; Valley View Road, \$3,000; Lee Lane, \$20,000; and Erickson Circle, \$3,000.⁵

6. At this same meeting, the Board voted to proceed with the Eagle Lake Road project.⁶

7. In September 2008, the Board certified the tax levy to fund the earlier-approved Eagle Lake Road project.⁷

8. Messrs. Smith and Larsen oppose the Eagle Lake Road project. In their view, other township roads are more deserving of repair. Further, they argue that the Eagle Lake Road project received a disproportionate amount of township resources because the then-Chair of the Township Board, Supervisor Froelich, lived along Eagle Lake Road.⁸

9. In March 2009, Everett Hoskins ran for re-election to the position of Burlington Township Supervisor. He was defeated by Brian Smith.⁹

10. At the March 2009 annual meeting, a motion was made by a Township elector to reverse the action taken by the Township Board in 2008 approving the renovations to Eagle Lake Road. A vote was taken on that motion among the electors present, and a majority supported that motion.¹⁰

² Test. of W. Fatland; Exhibit 1 (Disbursement Register). Mr. Fatland performs services for Burlington Township such as snow plowing, mowing, and road repair.

³ Test. of B. Smith and G. Larsen.

⁴ Ex. D.

⁵ Ex. D; Ex. 15, Addendum D; Test. of Linda Olson.

⁶ *Id.*

⁷ Test. of L. Olson.

⁸ Ex. H (*Becker County Record* article dated July 29, 2009); Test. of B. Smith; Test. of G. Larsen.

⁹ Test. of B. Smith.

¹⁰ Ex. 15, Addendum C (letter from David Green to attorney Troy Gilchrist dated March 18, 2009).

11. Following the meeting, Supervisor Green consulted the Township's attorney as to the effect of the electors' vote on the Eagle Lake Road project. The attorney advised the Board that the town electors do not have the authority to direct how money from Township levies is appropriated. The power to make or rescind appropriations, counsel advised, resides with the Township Board. For this reason, the attorney concluded that the vote at the Township meeting was merely advisory and did not deprive the Board of the authority to proceed with the Eagle Lake Road project.¹¹

12. At the May 14, 2009, Burlington Township monthly business meeting, Supervisor David Green made a motion to award contracts for the Eagle Lake Road and Acorn Lake Road renovation projects to Mark Sand & Gravel Company of Fergus Falls, MN. The proposed contracts totaled \$261,631.83. Over the objection of Supervisor Brian Smith, the motion was approved and the contracts awarded.¹² Also at this meeting, Jennifer Beck replaced Angela Ewanika as Clerk.

13. Chairperson Froelich, Treasurer Olson, and Clerk Beck signed the contracts for the Eagle Lake Road and Acorn Lake Road projects at the June 11, 2009, monthly business meeting of the Board.¹³

14. Burlington Township receives the receipts from the township portion of local property tax levies from the Becker County Auditor. These receipts are disbursed to the Township in two installments – one of which occurs on or around July 1, and a second which occurs on or around December 1.¹⁴

15. On July 1, 2009, the Township received the first installment of the annual tax receipts – a disbursement in the amount of \$217,000.¹⁵

16. At the July 9, 2009, monthly business meeting of the Board, Supervisor Smith presented quotations for road maintenance of 290th Street, Tower Road, Carefree Lane, and Indy 500 Road. The Board voted unanimously to accept the bid price from Driveway Services, in the amount of \$25,199.¹⁶

17. At the conclusion of the July meeting, Chairperson Froelich resigned from her position on the Board.¹⁷

18. Notwithstanding the Township Board's approval of road refurbishment projects, the Township treasurer does not encumber amounts of the annual levy

¹¹ Ex. 15, Addendum C (letter from Troy Gilchrist to David Green dated March 18, 2009).

¹² Ex. 2.

¹³ Ex. 3.

¹⁴ Test. of L. Olson.

¹⁵ Test. of L. Olson.

¹⁶ Ex. 1 (July 9, 2009, Monthly Business Meeting Minutes).

¹⁷ *Id.*

immediately following actions by the Board. Instead, by staging the receipt of contractor invoices and the start dates for various construction projects, the Township has been able to maintain more than \$100,000 in its various accounts.¹⁸

19. Shortly after the July 2009 Township monthly business meeting, Brian Smith and Gary Larsen reviewed the Township's treasurer's reports, meeting minutes, and bank statements. Likewise, Mr. Smith made inquiries of the Township's depository bank as to the current balances and various deposits with the bank. With these materials, the duo developed a spreadsheet detailing the Township's various financial commitments. They concluded that if the Township disbursed funds for each of the items as to which an appropriation of money had been earlier-approved, and continued to incur its regular operational expenses, the Township would not have sufficient funds to meet its obligations. Moreover, they projected that the Township would run out funds before receiving the second disbursement of tax levy revenue in December of that year.¹⁹

20. In a letter to the editor published in the *Frazee-Vergas Forum* on July 16, 2009, Gary Larsen wrote:

After August the Burlington Township check book balance will be *Zero!*
The savings reserve will be *Zero!* Property tax distribution will be *Zero!*
Burlington Township will not be able to pay the insurance, the snow removal, the electric bill, or even the Internal Revenue Service.

. . .

The component of taxes that would have been used for gravel, dust control and early winter snow removal has been totally consumed by the Eagle Lake Road paving projects. This was a choice of reckless spending in spite of an overwhelming rejection by the annual meeting voters with record breaking attendance. At last week's meeting, Chairperson Kathleen Froelich must have realized Burlington Township would be left penniless from the paving project that runs in front of her house. She abruptly resigned her position.²⁰

21. A July 29, 2009, article in the *Becker County Record* detailed the controversy surrounding the Eagle Lake Road project. The article contained statements from Brian Smith and Gary Larsen to the effect that the paving project on Eagle Lake Road was unnecessary. Gary Larsen expressed concern as a result of the commitments on the Eagle Lake Road project that there would not be funds available for other Township road projects.²¹

¹⁸ Ex. 16. See *also*, Ex. I.

¹⁹ Ex. 1; Test. of B. Smith; Test. of G. Larsen.

²⁰ Ex. C (emphasis in original).

²¹ Ex. H.

22. In response, the article quoted Supervisor Green as saying that the allegations of fiscal mismanagement were “a bunch of B.S.” Green opined that Smith instigated this controversy because the Township had earlier declined to designate as public roads, roadways which led to Smith’s 16-unit development.²²

23. Township Clerk Jennifer Beck was likewise quoted in the article to the effect that Township’s finances “are in good shape.” According to Clerk Beck, the Township’s bank balance on July 1, 2009, was approximately \$366,000. She explained that once the Township paid the contractor on the Eagle Lake Road project, sometime after September 1, the bank balance would drop to approximately \$94,000. Ms. Beck is quoted as stating that this sum would be sufficient until Burlington Township received its second tax levy installment from the County in December 2009.²³

24. In a letter to the editor from the Township Treasurer, Linda Olson, published in the *Frazee-Vergas Forum* on July 30, 2009, Ms. Olson responded to the claim that the Township would be out of money after August.²⁴ Ms. Olson detailed the Township’s financial obligations and resources, and noted that the Township had approximately \$38,000 in a checking account as of June 26, 2009, and approximately \$121,000 in a money market account. Treasurer Olson also defended the Board’s decision to undertake the Eagle Lake Road project.²⁵

25. A letter to the editor from Brian Smith also appeared in the *Frazee-Vergas Forum* on that day. Supervisor Smith defended the numbers in the spreadsheet that he and Gary Larsen compiled and called the Township Board “dysfunctional.” He encouraged township residents to attend the next monthly business meeting on August 13, 2009.²⁶

26. At the beginning of the August 13, 2009, monthly business meeting, Kathleen Froelich rescinded her resignation as Township Board Chair.²⁷

27. A Burlington Township resident complained that the Board had promised Erickson Circle residents that gravel for their road would be in place by the end of June and had failed to deliver on that promise. Later, in response to the question “What do we have available for funds to do graveling,” Chairperson Froelich responded, “We don’t.” The Chairperson asserted that the Board did not have enough resources in the Road and Bridge Fund “to do everything we want.”²⁸

²² *Id.*

²³ *Id.*

²⁴ Ex. C.

²⁵ *Id.*

²⁶ Ex. C.

²⁷ Ex. I.

²⁸ Ex. 16. See *also*, Ex. I.

28. Between June 2009 and December 2009, the Burlington Township monthly cash control statements fluctuated between \$109,663 and \$353,204.²⁹

29. The January 2010 Burlington Township Newsletter showed that the Township's checkbook balance in 2009 fluctuated between \$114,242 and \$349,190.³⁰

30. At the January 14, 2010 monthly business meeting, the Board approved a motion to pay Mark's Sand and Gravel \$26,625.73 for work performed on the Eagle Lake Road project.³¹

31. In January 2010, Gary Larsen filed an affidavit of candidacy for the office of Township Supervisor. Mr. Larsen sought election to the office held by Mr. Green, who was seeking re-election to another term.³²

32. Mr. Larsen disseminated campaign material asserting that Chairperson Froelich and Supervisor Green engaged in reckless spending by pushing through the Eagle Lake Road project. The campaign flyer stated "Residents were told in August the township had no money."³³

33. Mr. Larsen wrote a second letter to the editor that was published in the *Frazee-Vergas Forum* on February 25, 2010. In this letter he again asserted that the Township would soon be out of funds.³⁴ In that letter Mr. Larsen wrote:

Not only did I not ignore the [township] treasurer's report, but used the report to inform the public that we would be out of funds as was finally admitted in August by the chairman when she repeatedly told the residents that the township was out of money.³⁵

Mr. Larsen closed the letter by encouraging residents of the township to vote for him.

34. In Supervisor Smith's letter to the editor, which was also published in the February 25, 2010, edition of the *Frazee-Vergas Forum*, he stated that the road paving project supported by Supervisor Green and Township Chairperson Kathleen Froelich "took all of the money" and that Ms. Froelich repeatedly told residents in August that "the township had no money."³⁶ Mr. Smith asserted in his letter that "[t]his is not a

²⁹ Exs. 5-10.

³⁰ Ex. G.

³¹ Ex. F.

³² Test. of G. Larsen.

³³ Ex. E.

³⁴ Ex. A.

³⁵ *Id.*

³⁶ *Id.*

rumor. It is a fact.”³⁷ Mr. Smith closed his letter by encouraging residents to vote for Gary Larsen.

35. In a letter to the residents of Burlington Township, Supervisor Green responded to the comments of Gary Larsen and Supervisor Smith. He addressed the necessity of the Eagle Lake Road project as well as the financial status of the Township. Supervisor Green encouraged Township residents to call Treasurer Olson to get the facts on the Township’s financial situation. He closed his letter by asking for the votes of the Township residents.³⁸

36. Supervisor Green defeated Gary Larsen in the March 9, 2010, election for Burlington Township Supervisor.³⁹

37. Mr. Fatland filed this complaint with the Office of Administrative Hearings on March 26, 2010.

38. Brian Smith and Gary Larsen assert that the figures that they generated after the July 2009 Township monthly business meeting were accurate when they were developed. They assert that the balances shown on the Township’s monthly cash control statements oversimplify the Township’s financial circumstances.⁴⁰

Based upon the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the panel of Administrative Law Judges to consider this matter.

2. Campaign material is defined to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, ...”⁴¹ The letters to the editor and spreadsheet prepared by Brian Smith and Gary Larsen are campaign material within the meaning of that statute.

3. Minn. Stat. § 211B.06, subd. 1, provides, in part: “A person is guilty of a gross misdemeanor who intentionally participates in the preparation, [or] dissemination ... of ... campaign material with respect to the personal or political character or acts of a candidate ... that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office ..., that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.”

³⁷ *Id.*

³⁸ Ex. 15, Addendum C.

³⁹ Test. of G. Larsen.

⁴⁰ Test. of B. Smith; Test. of G. Larsen.

⁴¹ Minn. Stat. § 211B.01, subd. 2.

4. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.06, relating to false campaign material, is clear and convincing evidence.⁴²

5. The Complainant has failed to demonstrate that the Respondents violated Minn. Stat. § 211B.06 because the evidence is insufficient to prove that the materials at issue are false and that Respondents knew it was false or subjectively knew that it was probably false.⁴³

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

ORDER

IT IS ORDERED: The Complaint is DISMISSED.

Dated: June 9, 2010

/s/ Eric L. Lipman
ERIC L. LIPMAN
Presiding Administrative Law
Judge

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

/s/ William R. Johnson
WILLIAM R. JOHNSON
Administrative Law Judge

NOTICE

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

⁴² Minn. Stat. § 211B.32, subd. 4.

⁴³ See, *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App. 2006), *rev. denied* (Minn. July 19, 2006).

MEMORANDUM

Minnesota Statutes § 211B.06 prohibits the preparation and dissemination of false campaign material. The prohibition has two elements: (1) A person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person developing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is false.

As to the first element of the statute, the test is objective: The statute is directed against false statements of fact. The statute does not proscribe criticism of candidates that is merely unfair or uncharitable.⁴⁴ Indeed, this statute is set against the backdrop of the First Amendment, which assures Americans in the public square sufficient “breathing space” to assemble data, construct arguments and present conclusions to their fellow citizens.⁴⁵

With respect to the second element of the statute – namely, Respondents’ awareness surrounding the claims they made regarding the Township’s financial outlook – the test is subjective: Mr. Fatland must prove by clear and convincing evidence that the Respondents “in fact entertained serious doubts” as to the truth of the publication or acted “with a high degree of awareness” of its probable falsity.⁴⁶ Otherwise, his claim for relief fails.

At its essence, the dispute between Mr. Fatland and Messrs. Smith and Larsen is one over “cash-based accounting” versus “accrual accounting.” Smith and Larsen insist that once a project is approved by the Township Board, representations of the Township’s finances should reflect earlier Board actions through commensurate deductions to Board accounts. Fatland responds that such statements mischaracterize the Township’s fiscal health; as deductions to its accounts only follow from contractor invoices that are actually received and paid by the Township Treasurer.

Because there is a good-faith dispute as to which accounting method best portrays the Town’s finances, Smith and Larsen’s conduct is protected speech and falls short of the conduct that is proscribed by the statute.

⁴⁴ *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

⁴⁵ See, *Boos v. Barry*, 485 U.S. 312, 322 (1988), (“[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment”); compare also, *State v. Machholz*, 574 N.W.2d 415, 422 (Minn. 1998) (“Commenting on matters of public concern is a classic form of speech that lies at the heart of the First Amendment, and speech in public arenas is at its most protected on public sidewalks, a prototypical example of a traditional public forum”) (citing *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377 (1997)).

⁴⁶ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W. 2d 379 (Minn. App.) review denied (Minn. 2006).

The Minnesota Supreme Court's opinion in *Kennedy v. Voss*⁴⁷ is instructive. In that case, an incumbent County Commissioner complained that his opponent disseminated literature which unfairly characterized his support for programs serving the elderly. The challenger, citing the incumbent Commissioner's vote against the entire County Budget, which included funding for programs serving the elderly as well as other appropriations, asserted that the incumbent "is not a supporter of programs for the elderly."⁴⁸ The incumbent maintained that there were other votes, not cited in the challenger's literature, which made the incumbent's support of the programs clear.

While the Justices of the Minnesota Supreme Court might not have shared the challenger's assessment of the incumbent's voting record, or agreed with his reasoning, the Court held that the challenger was legally entitled to share his assessment with the wider electorate. As Chief Justice Sheridan summarized:

In this case, [the challenger] used a fact, respondent's "no" vote on the county budget vote, to infer that respondent did not support any of the individual items in that budget. Although the inferences made by the [challenger] may be considered extreme and illogical, they do not come within the purview of the statute. The public is adequately protected from such extreme inferences by the campaign process itself. For example, in this case, the [incumbent Commissioner] distributed two flyer's rebutting the [challenger's] remarks. The voters of Dakota County had every opportunity to judge for themselves what inferences could be properly drawn from the record of the candidates.⁴⁹

Likewise, Messrs. Smith and Larsen were entitled to apply accrual accounting practices to official data and share their conclusions with fellow voters. Because nothing in the record shows that the Respondents' calculations were demonstrably false, and circulated with some awareness of that falsity, their critiques are not items that the State may reach, regulate, outlaw or punish.

Whether or not Smith and Larsen's accounting methods best portray the fiscal outlook of the Township is a matter that is (and was) committed to the judgment and sound discernment of the electors of Burlington Township.

Mr. Fatland failed to establish by clear and convincing evidence that the campaign-related claims made by Messrs. Smith and Larsen in letters to the *Frazee-Vergas Forum* were false statements under the Fair Campaign Practices Act. The Complaint is therefore dismissed.

E. L. L., S. M. M., W. R. J.

⁴⁷ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981).

⁴⁸ *Id.* at 300.

⁴⁹ *Id.*